



REPUBLIC OF KENYA



KENYA LAW
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**Mwika v Republic (Criminal Appeal 152 of 2018)
[2025] KECA 1400 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1400 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 152 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
JULY 31, 2025**

BETWEEN

JOEL MWIKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgement of the High Court of Kenya at Meru
(R. Sitati, J.) dated 8th November 2018 in Criminal Appeal No. 37 of 2017)*

JUDGMENT

1. Joel Mwika, the appellant, was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that, on 11th September 2013 at [Particulars Withheld] Village, Mbirikene location in Imenti North District of Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the Vagina of GK a child aged 14 years.
2. In the alternative, the appellant faced the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* in that he intentionally and unlawfully touched the vagina of GK a child aged 14 years.
3. He pleaded not guilty on both charges and the matter went to full trial with the prosecution calling a total of five witnesses in support of its case. This being a second appeal, we will not delve into the facts of the case in detail, but will rehash only what may be necessary to place the appeal in proper context.
4. The child, (GK) testified that in the year 2013, she was 14 years old. That on 11th September 2013 she came from school and went to her uncle M's house where she found her uncle in the company of the appellant. She stayed in the house with them until around 7.00pm when the appellant lured her to his two roomed house where the appellant asked her to undress and had sex with her after offering her Ksh.300.00 which she said she declined to take. She testified that she started bleeding and felt a lot of



- pain. She stated that she stayed in his house from 7.00pm to 7.00am the next morning and that all that time he was having sex with her.
5. She testified that her parents looked for her and found her at the appellant's house and that the appellant attempted to run away but he was arrested and taken to the chief and then to the police station. She was taken to hospital where she was examined by PW5, Dr. James Kilumba, who confirmed that the child had been defiled.
 6. According to the doctor, on examination of the child, it was noted that the the child was mentally retarded with an epileptic condition. He testified that the hymen was perforated and GK had bruises on the perineum area between her genitalia and anus and that she had a whitish discharge coming from her genitalia. He testified that the child's health card showed that she was 14 years old at the time of examination.
 7. The child identified the appellant as the person she had sex with and stated that she knew him before as they went to the same church and belonged to the same youth group and that the appellant's house is not very far from theirs.
 8. PW2, (JK) the child's mother, testified that she had found her in the appellant's house. She stated that GK had told her that she had sex with the appellant. She testified that when they found GK her clothes, pantie and biker had blood stains. She stated that GK was fourteen years old at the time, having been born on 29th October 1999.
 9. The appellant was subsequently charged with the offences stated earlier.
 10. When placed on his defence, the appellant chose to give an unsworn defence. He stated that he and GK's mother had a shamba issue as he had leased the same land as had GK's mother. That they had disagreed and GK's mother had warned him of dire consequences. In other words, he claimed that the charges were fabricated against him by the child's mother who had a grudge with him.
 11. The learned trial Magistrate (Hon. B. Ochieng, S.R.M.) considered the ingredients of the offence of defilement, namely identification or recognition of the perpetrator, penetration and age of the victim, all of which he found had been proved. He rejected the appellant's defence that he had a land dispute with GK's mother and was framed. The trial court observed that the appellant did not shake or rebut the evidence tendered by any of the prosecution witnesses and that from the complainant's demeanour, she was found to be a truthful witness. The court found that the prosecution had proved the main charge against the appellant beyond reasonable doubt. He was convicted accordingly and sentenced to serve 20 years imprisonment.
 12. Dissatisfied with the judgment of the trial court, the appellant appealed to the High Court at Meru. After re-evaluating the evidence, the learned Judge (R. Sitati, J.) held that all the ingredients of the offence of defilement had been established. As regards the age of the complainant, the Judge held that the same was proved by her own evidence when she testified that she was 14 years old. And so did her mother, PW2; further the child's health card as referred to by PW5 showed that GK was 14 years old at the time of examination. The Judge held that there was sufficient evidence to show that as at 11th September 2013 when GK was defiled she was 14 years old.
 13. In the same vein, the learned Judge held that penetration was also proved through GK's own evidence as she testified that the appellant had sexual intercourse with her several times that night; and that this was corroborated by the medical evidence adduced by PW5 to the effect that PW1 was defiled, as the medical examination revealed bruises on the perineum area between genitalia and anus and that she had a whitish discharge emanating from her genitalia.



14. On the issue as to whether the appellant was identified, it was held that the appellant was well known to GK as a neighbour and also that they went to the same church, and that she had been in his house from 7.00pm to 7.00am the next morning.
15. The learned Judge found the appellant's defence to be a sham as the appellant was not sure whether he had been framed because of a land dispute or whether he had been arrested for the offence of being drunk. In short, the trial Judge held that the appellant's defence was devoid of merit. She dismissed it and accordingly upheld both the conviction and sentence.
16. Further aggrieved, the appellant has now filed this second appeal citing seven grounds of appeal. He faults the Judge for, inter alia, failing to find that the age of the complainant was not proved beyond reasonable doubt; relying on incredible evidence adduced by the prosecution witnesses; failing to note that no injuries were found on the body of the complainant during medical examination.
17. The appellant urged that the appeal be allowed, the conviction be quashed and the sentence set aside.
18. We heard this appeal on 12th June 2024. The appellant appeared in person while the learned State Counsel Miss. Grace Mukangu appeared for the prosecution.
19. In his submissions, the appellant seemed to suggest that the child was his girlfriend and that she had willingly engaged in the sexual act. That he was only 18 years old at the time but he is now a grown up and has learnt a lot in prison and that he is fully rehabilitated and ready to be productive in building the nation. He urged the Court to use its discretionary powers in sentencing for leniency and that he be set at liberty.
20. In opposing the appeal, the respondent submitted that all the ingredients of the offence were proved to the required standard. On the age of GK, it was submitted that the same was proved to be 14 years old at the time of defilement; on penetration it was submitted that PW5 concluded that there was forceful penetration because GK's hymen was perforated and there was a bruise on the perineum area between her genitalia and anus and that she also had a whitish discharge emanating from her genitalia; further it was submitted that there were no contradictions or inconsistencies while proving the issue of penetration as it was well corroborated. On the identity of the appellant, it was submitted that PW1 testified that the appellant was well known to her as he was a neighbour and that they went to the same church.
21. With regards to the sentence, it was submitted that the same was sound and that this Court ought not to interfere with the same. Reliance was placed on *Bernard Kimani Gacheru v Republic* [2002] eKLR. It was the respondent's view that the appeal has no merit, and that we should accordingly dismiss it and uphold both the conviction and sentence.
22. This is a second appeal, and our remit is restricted to addressing only matters of law by dint of section 361(1) of the *Criminal Procedure Code*.
23. In interpreting the said provision, in *Hamisi Mbela Davis & Another v Republic* [2012] KECA 147 (KLR), this Court held as follows:

“This being a second appeal, this Court is mandated under Section 361(1) of the *Criminal Procedure Code* to consider only issues of law. As was held in *M'Riungu v Republic* (1983) KLR 445:-

“Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holding of law or mixed findings of fact and law, and it



should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (*Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)*).”

24. We have considered the record of appeal, the respective rival submissions and the law. In this appeal, the two courts below arrived at the concurrent findings of fact that the appellant committed the offence of defilement. This Court cannot interfere with those findings of fact unless such findings were founded on no evidence or unless, on the totality of the evidence relied upon, no reasonable tribunal would arrive at such findings. (See *Adan Muraguri Mungara v Republic* [2010] KECA 131 (KLR).
25. We have carefully examined the record of appeal and the respective submissions. In our view, the issues that fall for our determination are: whether the prosecution proved its case beyond reasonable doubt; whether the appellant’s defence was considered, and whether the sentence meted out was appropriate.
26. To secure a conviction for the offence of defilement, the prosecution is obligated to prove the age of the complainant who should be a minor, penetration and identification of the perpetrator.
27. On the child’s age, we have no doubt the same was proved beyond reasonable doubt through the evidence we have analysed earlier. Both the trial court and the High Court made the right finding that the evidence before the trial court proved that she was 14 years old. On the issue as to whether penetration was proved, GK was taken to the hospital for examination the following day after the incident. The medical examination confirmed that she had been defiled, and the two courts below accepted the said evidence as true and credible. We have no reason to find otherwise.
28. Turning to the issue as to whether the appellant was positively identified as the perpetrator, GK testified that she knew the appellant well as they went to the same church and also that they belonged to the same youth group, the appellant did not refute the fact that he also knew GK. As a matter of fact, he submitted that he was GK’s boyfriend. Further the appellant was found with GK in his house by PW2 who testified as such. Identification was, therefore, proved to the required standard.
29. We are satisfied that all the ingredients of the offence of defilement were established to the required standard. We find no reason to disturb the concurrent findings of the two courts below as they were based on credible evidence.
30. We also hold, just as did the two courts below, that the appellant’s defence that he was framed by the complainant’s family or that GK willingly engaged in sex, had no basis and was ousted by the strong prosecution evidence that established the offence of defilement. In any case, Section 42 of the *Sexual Offences Act* provides that a person consents if he or she agrees by choice and has the freedom and capacity to make that choice. It is trite law that a minor is deemed to be incapable of consenting. GK, being 14 years old lacked capacity to consent to engaging in any sexual acts with the appellant. She is also a person living with mental disability.
31. Turning to the last issue as to the propriety of the sentence, section 8(3) of the *Sexual Offences Act* provides that a person who commits the offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The appellant was given the lowest sentence in the applicable band. In any event, severity of sentence in a second appeal is a question of fact pursuant to section 361(2) of the *Criminal Procedure Code*. We cannot interfere with the sentence passed by the trial court and upheld by the High Court, as the same was lawful.



32. Ultimately, we reach the conclusion that the appeal is devoid of merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

